

UNFAIR COMPETITION BY TRUTHFUL DISPARAGEMENT

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It WOULD seem to be fairly obvious that an action should lie against an individual, whether a competitor or not, who makes *false* defamatory statements about another's character or *falsely* disparages another's goods. And so the courts have held for a century or longer, both here and in England.¹

This article proposes to discuss a question whose solution is less obvious. That question is whether, under certain circumstances, derogatory statements about a business rival should be regarded as unlawful, even though such statements are *true* in fact or merely expressions of opinion. To illustrate, should a trader be privileged to "enlighten" customers about the private life, the personal peculiarities and views of his competitor or to criticize his business policies and his goods?

That these problems constantly intrude in the daily conduct of business is evidenced by the fact that business men themselves have attempted to deal with them in "Codes of Fair Practice."² Writers on business ethics have treated the subject.³ The same questions have given rise to extensive litigation abroad.⁴ Yet not long ago it would have been largely academic to discuss them in an American legal periodical. It has been, and still is, settled beyond challenge that in the absence of statute actions for personal defamation and for disparagement of goods both presuppose a false statement.⁵ In the last few years, however, an important development has occurred which gives a new aspect to the questions here raised. Courts have become accustomed to regard defamation of a business rival and disparagement of his goods as actionable unfair competition. Said the Court in the recent case of *Gardella v. Log Cabin Products Com-*

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1. ODGERS, *LIBEL AND SLANDER* (6th ed. 1929) 1, 16, 66. NEWELL, *SLANDER AND LIBEL* (4th ed. 1924) 1, 197. For the differences between the action for disparagement of goods and the action for defamation see Handler, *Unfair Competition* (1936) 21 *IOWA L. REV.* 175, 197.

2. See *infra*, p. 1333.

3. SHARP & FOX, *BUSINESS ETHICS* (1937) 141.

4. See *infra*, pp. 1309, 1317.

5. See ODGERS, *op. cit. supra* note 1, at 1, 16, 66, 149; NEWELL, *op. cit. supra* note 1, at 197, 764; Handler, *supra* note 1, at 197. For recent cases see *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 288 Ill. App. 79, 5 N. E. (2d) 610 (1937); *Alabama Ride Co. v. Vance*, 178 So. 438 (Ala. 1938); *Pennington v. Little*, 266 Ky. 750, 99 S. W. (2d) 776 (1936). New Hampshire seems to be the only jurisdiction where the common law has been changed by judicial decision. See Ray, *Truth: A Defense to Libel* (1932) 16 *MINN. L. REV.* 43, 53.

pany⁶ " . . . a cause of action for unfair competition is stated which in turn consists of the tort of defamation."

To say that the tort of defamation or of disparagement of goods constitutes an act of unfair competition if committed by a business rival, involves more than mere terminology. Earlier, courts had realized that an injunction is the only effective means of protecting a man's business from unlawful interferences by his competitors. Therefore, an equitable remedy has long been granted in actions for unfair competition.⁷ In actions based upon defamation of character and disparagement of goods, on the other hand, a common law rule forbids equitable relief.⁸ Today, most authorities sanction evasion of this rule where the suit is brought on the theory of unfair competition. "Where the gravamen of the action is to enjoin unfair competition, the question of libel and slander is only incidental to the action, and such an action is not one to enjoin a libel or slander."⁹ And again: " . . . it is . . . the duty of the court of equity to enjoin unfair competition waged by means of slander, defamation, or misrepresentation of a competitor's goods . . . "¹⁰

6. 89 F. (2d) 891, 895 (C. C. A. 2d, 1937).

7. WALSE, *EQUITY* (1930) 214, 221, 234 *et seq.*

8. Equitable relief against defamation of character as well as disparagement of goods has been denied on the ground that the constitutional right of free speech would be violated by giving an injunction. *Brandreth v. Lance*, 8 Paige 24, 34 Am. Dec. 368 (N. Y. Ch. 1839); *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163 (1902). See *infra*, p. 1333. As regards defamation of character the further argument has been advanced that equity protects only property rights, not personal rights. See CLARK, *EQUITY* (1919) 311 *et seq.*; WALSE, *EQUITY* (1930) 259 *et seq.*; Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640.

9. *Dehydro, Inc. v. Tretolite Co.*, 53 F. (2d) 273 (N. D. Okla. 1931).

10. *Bourjois, Inc. v. Park Drug Co., Inc.*, 82 F. (2d) 463, 471 (C. C. A. 8th, 1936). Accord: *Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N. Y. Supp. 692 (4th Dep't 1928); *Old Investors' and Traders' Corp. v. Jenkins*, 133 Misc. 213, 232 N. Y. Supp. 245 (Sup. Ct. 1928), *aff'd*, 225 App. Div. 860, 233 N. Y. Supp. 845 (1st Dep't 1929); *Downes v. Culbertson*, 153 Misc. 14, 275 N. Y. Supp. 233 (Sup. Ct. 1934).

In *Willis v. O'Connell*, 231 Fed. 1004 (S. D. Ala. 1916), a suit to enjoin a libel by a non-competitor was dismissed. The Court intimated that the injunction would have been permitted had the case involved unfair competition. Cf. *Maytag Co. v. Meadows Mfg. Co.*, 35 F. (2d) 403 (C. C. A. 7th, 1929); *Vortex Mfg. Co. v. Ply-Rite Contracting Co.*, 33 F. (2d) 302 (D. Md. 1929); *Pure Milk Producers Ass'n v. Bridges*, 68 P. (2d) 658 (Kan. 1937). The recent case of *Menard v. Houle*, 11 N. E. (2d) 436 (Mass. 1937) goes even one step further in granting injunctive relief against a non-competitor. Cf. *Saxon Motor Sales, Inc. v. Torino*, 2 N. Y. Supp. (2d) 885 (Sup. Ct. 1938); Nims, *Unfair Competition by False Statements or Disparagement* (1933) 19 CORN. L. Q. 63, 66; Handler, *supra* note 1, at 199; DERENBERG, *TRADE-MARK PROTECTION AND UNFAIR TRADING* (1936) 137. A recent New Jersey case, *Hollander v. Hollander*, 117 N. J. Eq. 578, 177 Atl. 80 (1935), where the court, adhering to the old rule, refused to enjoin a trader from misrepresenting the quality of his rival's goods, is out of line with the present weight of authority.

The question decided in these cases was merely that of equitable relief. But their significance transcends by far the remedial point at issue. Once it is recognized that a distinction exists between ordinary defamation and competitive defamation, that competitive defamation constitutes unfair competition and calls for more swift and effective redress than ordinary defamation, the door has been opened for a further inquiry—whether, in an action for unfair competition, the *substantive* law of defamation should still be controlling. And the same is true of disparagement of goods.

There is evidence that courts already are embarking upon such a quest.¹¹ Unfair competition is an expanding concept, and affords room for this adventure.¹² While originally no more than a convenient name for the doctrine that no one may pass off his goods as those of another,¹³ the term has, in the last two or three decades, come to be applied to a variety of other situations. The copying of news¹⁴ and phonograph records¹⁵ as well as the use of another's trade secrets¹⁶ have been enjoined on the ground of unfair competition, although no element of passing-off was involved.¹⁷ Today, *false* defamation and disparagement are considered to be unfair competition. As the standards of business behavior rise and as judges become more sensitive in appraising competitive conduct, there can be but little doubt that the question will soon come before the courts whether *truthful* defamatory statements or expressions of unfavorable opinion about another's goods or business practices might not also constitute enjoined unfair competition.

In anticipation of decided cases we shall now consider whether the law of unfair competition affords a principle or principles which can be evoked to protect a business man from the attacks referred to; and, if it does, what the extent of such protection should be.

11. Cf. *Gardella v. Log Cabin Products Co.*, 89 F. (2d) 891 (C. C. A. 2d, 1937) where the Court said on page 896: "In cases of disparagement or defamation of property the common-law rule seems to be that actual damage must be established . . . There is an indication in the cases, however, that in actions for unfair competition damages for injury to the reputation of a product may be awarded without proof of actual loss." Cf. Handler, *supra* note 1, at 199-200.

12. Fathchild, *Static and Dynamic Concepts of the Law of Unfair Competition* (1936) 1 Mo. L. Rev. 299, 305.

13. *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 531-532 (1933); DERENBERG, *op. cit. supra* note 10, at 81; Handler, *supra* note 1, at 187.

14. *International News Service v. The Associated Press*, 248 U. S. 215 (1918).

15. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937).

16. *Colonial Laundries v. Henry*, 48 R. I. 332, 138 Atl. 47 (1927). Cf. also *Vortex Mfg. Co. v. Ply-Rite Contracting Co.*, 33 F. (2d) 302 (D. Md. 1929).

17. See also *Federal Trade Commission v. Keppel and Bro., Inc.*, 291 U. S. 304 (1934), where the court held that "unfair methods of competition" within the meaning of § 5 of the Federal Trade Commission Act was an expanding concept. A detailed discussion of this section is beyond the scope of the article.

The problem here broadly outlined has several phases. Let us begin with truthful references to a competitor's past conduct.

I.

DEFAMATORY STATEMENTS ABOUT A COMPETITOR'S PAST CONDUCT

Suppose that some time in the past a business man has been punished for a criminal offense, connected or unconnected with the conduct of his business, or that he has offended against generally accepted standards of honesty or decency in or outside of his business. And let us further assume that he has reformed since and has become, or is about to become, a useful and respectable member of society. Should a competitor be permitted to expose to customers or prospective customers the past and all but forgotten misdeeds of his rival? If no other influence intrudes, self-interest will, as a rule, cause the public to buy from that seller who offers the best goods or services at the lowest price. But if a competitor informs the public of his rival's misconduct of by-gone days, attention will be diverted from the relative merits of the parties' goods or services to the personalities of the rival traders—a collateral issue which does not really concern buyers. By shifting the plane of competition and appealing to emotion rather than to intelligence the competitor may sway the public over to his side, where he might otherwise have failed. Such conduct is unfair to his rival in that it deprives him of the reward to which he may be entitled by virtue of his superior service. It is also detrimental to the best interest of the buying public and has, therefore, all the attributes of enjoinable unfair competition. Any reference to crime, fraud, dishonesty, immorality, or other disreputable behavior of by-gone days should fall under the ban of the law when the plaintiff's acts are unconnected with the present competitive struggle and have no bearing on his present reliability and honesty as a supplier of goods or services. This principle should be applied whether the plaintiff's acts had been committed 20 years, 10 years, 1 year or even less before reference to them was made.¹⁸

We have already seen that at common law in civil actions for libel or slander the truth of the defamatory words constitutes a complete defense irrespective of the defendant's motive,¹⁹ and it might be inferred that public policy favors the unrestricted freedom of one individual to disseminate truthful defamatory information about another. But in criminal prosecutions for libel, truth is a good defense only if the libel was

18. Cases may arise where the defendant advises customers or prospective customers of the plaintiff's criminal acts immediately after the trial and conviction. See *infra*, p. 1312.

19. *Ray, Truth: A Defense to Libel* (1932) 16 MINN. L. REV. 43, 51.

published "with good motives and for justifiable ends."²⁰ This affords a strong indication that public policy today is opposed to, and seeks to prevent, publication of true defamatory statements except in cases where there is a valid excuse. And few will deny that a trader cannot be said to act with "good motives" if he informs prospective customers of his rival's past transgressions for the sole purpose of gaining a competitive advantage. When the different rule prevailing in civil actions for libel is considered in the light of criminal libel law, the conclusion is inescapable that the civil rule stands merely for the narrow proposition that a man should not recover *money damages* for an injury to a character which he does not possess.²¹ To *enjoin* the defendant, on the ground of unfair competition, from disseminating the defamatory matter in the future would not be in conflict with that policy. Moreover, there is the very important difference between the law of defamation and the law of unfair competition that the former protects a man's reputation, while the latter protects his business. It may, perhaps, be argued that a man's reputation does not deserve to be protected if the charges of disreputable conduct are true. The argument does not hold where interference with the plaintiff's business is the theory of relief. The loss of customers is no less real if caused by true defamatory statements than it would be if caused by false charges. The rule governing civil actions for libel and slander affords, therefore, no argument against holding the truth of the charge to be immaterial in an action for unfair competition.

Analogies in support of this position are not lacking. In *Melvin v. Reid*²² the suit was for damages for the exhibition of a moving picture film which accurately depicted incidents in plaintiff's past life, and revealed her true name to the public. The court held for plaintiff on the ground that her right of privacy had been invaded. It was pointed out in vigorous language that the objective of society is to sustain and aid a person who by his own efforts has rehabilitated himself; no one should be permitted, for mercenary reasons, to throw such a person back into a life of shame or crime. This reasoning applies with equal force where the defendant is a competitor. *Melvin v. Reid* accords with other holdings recognizing the right of privacy. Said the court in the leading case of *Pavesich v. New England Life Insurance Co.*,²³ "that the law makes the truth in suits for slander and libel . . . a complete defense may not necessarily make the publication of the truth the legal right of every person, nor prevent it from being in some cases a legal wrong." Brandeis and Warren, in their well-known article on the right of privacy,²⁴ state

20. The great majority of the states have constitutional or statutory provisions to this effect. See Ray, *supra* note 19, at 47.

21. See POLLOCK, TORTS (13th ed. 1929) 266; Ray, *supra* note 19, at 55.

22. 112 Cal. App. 285, 297 Pac. 91 (1931).

23. 122 Ga. 190, 204, 50 S. E. 68, 74 (1905).

24. Warren and Brandeis, *The Right to Privacy* (1890) 4 HARV. L. REV. 193, 218.

the rule thus: "The truth of the matter published does not afford a defense. Obviously, this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy."²⁵

It might perhaps be argued that a suit based on the right of privacy provides the proper relief against competitive defamation. Although there appear to be no cases on the point, it is conceivable that this position might find favor with some courts. But apart from the fact that the right of privacy is recognized only in a few jurisdictions and has been rejected in others,²⁶ it would seem for reasons both of principle and expediency that the law of unfair competition is the proper basis of relief. If a trader makes a defamatory statement about a rival to the rival's customers, the primary purpose is to acquire that rival's customers, that is, to injure his business. It is this injury that the rival will seek to redress rather than injury to his privacy. Furthermore, it may be difficult to obtain an injunction on the theory of an invasion of the right of privacy. The general rule still prevails that equity protects only property rights,²⁷ and while a more liberal tendency is noticeable,²⁸ there is as yet not much authority for granting injunctive relief where the injury is to personality.²⁹ It is well settled, on the other hand, that an injunction will be granted where a cause of action is shown in unfair competition.³⁰

The argument here advanced for grounding relief on the theory of unfair competition has been adopted by German, French and Swiss courts. The German Unfair Competition Statute of 1909³¹ provides that any person who, in the course of competition, engages in conduct *contra bonos mores* (*wider die guten Sitten*) shall be liable to an injunction and damages (§1). It is well settled that an action will lie under this provision if a competitor makes true defamatory statements about a rival's past, provided that the information so divulged is of no present concern to busi-

25. See also *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927). For a collection of authorities see HANDLER, CASES AND MATERIALS ON TRADE REGULATION (1937) 800 *et seq.* Cf. also LOS ANGELES BAR ASSO. BULL. (1937) 100. Normand, *The Law of Defamation in Scotland* (1938) 6 CAMB. L. J. 327, 337.

26. See HANDLER, *op. cit. supra* note 25, at 801; Moreland, *The Right of Privacy To-day* (1931) 19 KY. L. J. 101.

27. WALSH, EQUITY (1930) 266.

28. Cf. *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930), (1937) 51 HARV. L. REV. 166, (1937) 32 ILL. L. REV. 496, (1938) 22 MINN. L. REV. 566; *Flake v. Greensboro News Co.*, 195 S. E. 55 (N. C. 1938).

29. Moreland, *supra* note 26, at 127; Lisle, *The Right of Privacy To-day* (1931) 19 KY. L. J. 137, 143.

30. See *supra*, p. 1305.

31. Gesetz gegen den unlauteren Wettbewerb, Reichsgesetzblatt (1909) 499. For the history of the Act see Wolff, *Non-Competing Goods in Trade-Mark Law* (1937) 37 COL. L. REV. 582, n. 26.

ness customers. Thus an injunction against repetition was granted where the defendant had informed a customer (for whose trade he and the plaintiff were contending) of a criminal offense committed by his business rival more than eight years before.³²

The German courts have gone a long way in enforcing this principle. It was applied in a case where the plaintiff, the National Cash Register Company of Dayton, Ohio, during the World War, had written a letter to all of its agents wherein it was stated, among other things: "We must beat them [The Central Powers] or the word Germany will be a stench in the nose of civilization for the next thousand years." In 1929 the defendant, a German competitor, had translations made of this circular for distribution among prospective buyers. Said the court, in granting an injunction:³³

"It is true that the letter libeling the German people in the vilest manner was used by plaintiff itself as an unfair competitive means in the year 1918 . . . Its use by the plaintiff company as an unfair competitive means does not give defendant the right to use it, long after, in 1929 and 1930, as a competitive weapon against the plaintiff. Defendant's conduct is just as unfair as it would have been to disseminate information about a criminal act which had in fact occurred many years before. The guilty party should not have his misdeed thrown up to him for the rest of his life. . . . Competition should proceed upon the basis of the goods themselves. The contest is not between the personalities of the competitors. In using the plaintiff's publication, ten years after the war, defendant exceeded the limits of normal orderly competition. It is immaterial that the information disseminated by defendant was true."

Another interesting application of the same principle may be found in those German cases where the defendant was enjoined from publishing the terms of a judgment which he had obtained in an unfair competition proceeding against the plaintiff. As a general rule such publication is permissible, being essentially a defensive measure designed to enlighten the public and to restore the competitive equilibrium which had been disturbed in favor of the guilty party by his unfair practices. But pub-

32. Reichsgericht II. Z. S. of Feb. 24, 1933; *Markenschutz und Wettbewerb* (MW) 33, 252.

33. Kammergericht xxxi. Z. S. of Nov. 9, 1931, MW 32, 253. See also Reichsgericht II. Z. S. June 14, 1932, MW 32, 455, where the defendant was enjoined from informing customers that his rival had conspired with the enemies of the German people to bring about the separation of the Rhineland from Germany. The court found that the plaintiff's treasonable activities dated many years back. These German decisions are particularly interesting since the Unfair Competition Statute contains an express provision giving a remedy for false defamatory statements (§ 14). The courts might easily have construed this section as indicating a legislative intent that no action should lie for true defamatory statements.

lication ceases to be defensive and assumes the characteristic elements of an attack, if it appears at a time when the public, having forgotten the plaintiff's unlawful practices, need no longer be enlightened. This constitutes an attempt to exploit the decree for the defendant's own advertising purposes and has, therefore, been held to be enjoinable unfair competition.³⁴

France, unlike Germany, has no special Unfair Competition Statute. The law of unfair competition grew out of the general tort rule of the French Civil Code of 1804. It is provided in article 1382 that everyone who wrongfully injures another person shall be liable for damages. Relying on that article, the Tribunal Civil de la Seine, in the case of *Jacquot v. Berthoud* held that defendant had "exceeded the limits of fair competition" in calling the attention of the public, in 1872 and 1875 respectively, to a civil judgment that had found plaintiff guilty of infringement as far back as 1859.³⁵ In Switzerland, as in France, the law of unfair competition developed out of statutory tort provisions couched in very general terms. The Federal Supreme Court of Switzerland has held that disparagement of a rival might constitute unfair competition even though the statements are true.³⁶

If these decisions had been rendered under specific statutory provisions giving a remedy for true defamatory statements, they could hardly be expected to arouse the interest of American lawyers and judges. What makes them significant is the fact that the German, French and Swiss courts, in reaching their conclusions, had nothing to guide them but broad statutory generalities. Since in this country, also, judges have to fill the term "unfair competition" with meaning by establishing definite standards, these foreign precedents would seem to be of assistance.

34. Oberlandesgericht Hamburg IV. Z. S. August 10, 1926, MW 26, 223 (publication of decree more than five years after issuance enjoined.) Accord: Reichsgericht II. Z. S. March 31, 1925, MW 24, 206; Oberlandesgericht Kiel II. Z. S. March 25, 1913, MW 13, 328 (publication of decree more than one year after issuance enjoined); cf. Reichsgericht II. Z. S. June 15, 1934, MW 34, 370.

35. *Annales de la Propriété, Industrielle*, (Annâles) 1878, 331. True, the defendant was chargeable with a minor inaccuracy in summarizing the judgment of 1859. But a close reading of the decision would seem to warrant the conclusion that this was not the *ratio decidendi* of the case.

36. Decision of November 23, 1895, reported in *Gewerblicher Rechtsschutz und Urheberrecht* (G. R. U. R.) 1897, 110 *et seq.* The Court, in a well reasoned opinion, reached the conclusion that where a business man had made it a practice to refer to his competitor's past the truth of the allegation could not be pleaded as a defense.

II.

DEFAMATORY REFERENCES TO PRESENT UNLAWFUL OR UNETHICAL
BEHAVIOR OF THE RIVAL UNCONNECTED³⁷ WITH THE
CONDUCT OF HIS BUSINESS

It remains for us to consider whether the rule should differ when the defendant refers to *present* unlawful or unethical behavior of his rival *unconnected* with the conduct of his rival's business. If a business man has violated the criminal law and gone unpunished, or if he is still engaged in criminal activities of one sort or another, the public interest in law enforcement demands that a competitor, no less than any other citizen, be free to communicate to the prosecuting authorities any information he may possess about such unlawful acts. But public interest does not demand that the competitor be free to lay the information before his rival's customers. On the contrary, to do so would seem to be unfair competition for the same reason that reference to the rival's past is reprehensible. The unfairness lies "in depriving the rival of the reward to which he may be entitled by virtue of his superior service."³⁸ Competition, even with a law breaker, should proceed on the basis of his goods or services, and it is submitted that to enforce such a rule would be in the interest not only of the competitor but of the buying public as well. There is an additional reason why it may be regarded as unfair for a competitor to advise customers about his rival's unlawful acts. The information, without being false, may be incomplete and therefore misleading. At the time the attack is delivered the rival is not present to defend himself and give his side of the story. Thus customers may presume him guilty and withdraw their patronage before he has had an opportunity to be heard.

Of course, this latter argument is less persuasive if the defendant does not inform customers of his rival's wrongdoing until after the latter's trial and conviction. Even then the danger of incomplete and one-sided information is not entirely eliminated. The defendant may, for instance, fail to paint a complete picture by omitting to mention that his rival has been recommended for a pardon. But assuming that the defendant gives customers an impartial account of all the material facts, the question arises whether an injunction should not be granted on the strength of the first reason alone. A recent German decision has answered this question in the affirmative. Plaintiff, a machine manufacturer, had been convicted and fined for violating the foreign exchange laws. The defendant immediately had copies made of a newspaper account that ap-

37. On the question as to whether the defendant should be permitted to refer to present unlawful or unethical behavior of his rival in connection with the conduct of the rival's business, see *infra*, p. 1328.

38. See *supra*, p. 1307.

peared on the day following the trial, and then instructed his salesmen to read the story to prospective customers. The court held that the plaintiff's offense threw no light on the quality of his machines and took what would seem to be the commendable position that it is not the function of a competitor to spread the news of his rival's misconduct among customers.³⁹

The same considerations apply where a competitor believes that his rival is guilty, not of criminal or unlawful acts but of lack of patriotism, disloyalty to the government or some unethical conduct. The competitor is at liberty to expose his rival's conduct to such agencies as are competent and accustomed to investigate it. The Trade Association or the Chamber of Commerce may be the proper organizations. He should not be at liberty to refer to these matters in advertising circulars or in personal conversation with customers.

While as a rule the merits of the goods or services rather than the personalities of the rival tradesmen should turn the scales in favor of one or the other of the contending parties, there are instances where the seller's character may be of interest to the buyer. When a buyer considers entering into a long-term contract for the delivery of a commodity or when he considers purchasing a machine on the seller's promise to keep it in free repair for several years, the buyer's choice between two rivals will of necessity be influenced by their reliability in performing their contracts. Now it is conceivable that a seller's behavior, though not directly connected with the conduct of his business, might permit one to draw some inferences as to his reliability. And here it may be argued that a competitor, in informing a prospective buyer, would do him a real service and should be allowed to do so. This point came up in a recent German case where the parties were competing for long-term contracts and the defendant had told prospective customers that the plaintiff was a political opportunist and, while formerly a Socialist, had joined the Nazi party only for the sake of private gain. The court intimated that a trader might not be acting unlawfully in advising prospective customers about his rival's unreliability but refused to apply such a principle, if it existed, to the facts of this case. The court held that the conduct imputed to the plaintiff did not cast reasonable doubt on his trustworthiness in executing his contractual obligations and that the defendant's statement referred to a matter which was of no real concern to customers and outside the competitive struggle of the parties.

39. Reichsgericht II. Z. S. October 22, 1937, MW 38, 62. The same result has been reached even where the story is read to a customer already familiar with the plaintiff's offense through newspapers or other sources. By emphasizing the offense, the defendant may well manage to stir the customer's sensibilities and persuade him to cease business relations with the plaintiff. Reichsgericht II. Z. S. June 16, 1925, MW 25, 96.

An injunction was granted on the ground of unfair competition irrespective of the truth of the defendant's statement.⁴⁰ The court suggested that the proper course for the defendant to follow would have been to make representations to the public authorities rather than to the plaintiff's customers.

III.

STATEMENTS ABOUT A COMPETITOR WHICH, THOUGH NOT DEFAMATORY, MAY PREJUDICE CUSTOMERS AGAINST HIM

A business man may have certain personal characteristics or he may hold certain views which, if exposed, might not affect his reputation as a man of character and honor and yet might prejudice the public or certain sections of it against him. Should a competitor be permitted to inform customers about the private life, the political or religious beliefs or the racial origin of his rival? Can it be said to be fair competition if in order to discredit his rival he tells customers that his rival believes in the Fascist or Communist form of government, or that he never goes to church, or that he is a colored man? All these matters have no bearing upon the quality of that rival's goods or services or on his social usefulness as a seller and should not, therefore, be dragged into the competitive struggle. Again, the right of privacy affords an analogy. It has been held to be an unlawful invasion of that right to comment in public on a man's personal affairs even when no financial loss was caused and when the injury inflicted was injury to personality only.⁴¹ And the truth of the comment was held to be no defense. *A fortiori*, should not the law give a remedy where such comment is also intended and calculated to damage a man's business, that is where the injury is to property rights?

In Germany it is well settled that a business man who, for advertising purposes, refers to such personal characteristics or beliefs of a rival as would be calculated to arouse the prejudice of customers and therefore injure that rival's business, is guilty of unfair competition and can be enjoined under Section 1 of the German statute.⁴² How deeply this principle is embedded in the law can best be illustrated by an interesting recent application. In view of the well-known anti-Jewish policies of the National Socialist Government there would have been no cause for surprise if the courts generally had permitted business men to inform

40. Reichsgericht II. Z. S. January 25, 1935, MW 35, 151. Accord: Reichsgericht II. Z. S. February 22, 1935, MW 35, 231. But *cf.* Reichsgericht II. Z. S. May 15, 1928, MW 27-28, 494.

41. *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927); see also cases cited *supra*, notes 22, 23.

42. See *supra*, p. 1309.

customers of the Jewish origin of their competitors. It might easily have been argued that to do so would further the aims of the National Socialist State. Some lower courts, indeed, have taken this view.⁴³ Yet the German Supreme Court, applying the general rule, has enjoined this conduct on the ground of unfair competition.⁴⁴

IV.

DISPARAGEMENT OF A COMPETITOR'S GOODS

In all the situations discussed up to this point the intention of the aggressor was, of course, to divert business which would normally go to his rival. This end was sought to be accomplished by indirection, that is, by discrediting the person of the competitor in the eyes of customers so as to make them blind to the merits of his goods or services. We shall now consider those situations where the attack is directly aimed at the competitor's business. Let us begin with the most common and most effective attack, which consists in making derogatory references to the character, quality, utility or value of another's goods.⁴⁵

Disparagement may assume various forms. The rival's goods may be condemned in such general terms as "worthless" or "no good". Specific defects of his articles may be mentioned and criticized. Or, without doing either, a trader may simply assert that his goods are better than, or superior to,⁴⁶ the competitor's goods, either in general or in some particular respect. This latter type of attack, sometimes called "comparative disparagement", will be discussed first.

In the leading English case of *White v. Mellin*⁴⁷ the parties were competing manufacturers of Infant Food. The defendant advertised that his preparation was far more nutritious and healthful than the plaintiff's.⁴⁸ Action was brought for damages and an injunction. The alternative, as the court saw it, was either to make the issue turn on the

43. See RUDLOFF-BLOCHWITZ, *DAS RECHT DES WETTBEWERBS* (1938) 228.

44. Reichsgericht II. Z. S. January 12, 1937, MW 37, 250. Accord: Reichsgericht II. Z. S. February 25, 1936 G.R.U.R. 1936, 645. But cf. Reichsgericht II. Z. S. January 26, 1937, MW 37, 246, permitting the defendant to make representations to the public authorities.

For an excellent discussion of the problems dealt with up to this point see CALLMANN, *DER UNLAUTERE WETTBEWERB* (1932) 175.

45. See Handler, *supra* note 1, at 197.

46. Or, what amounts to the same thing, that the competitor's goods are inferior to his own. Cf. Smith, *Disparagement of Property* (1913) 13 COL. L. REV. 133.

47. [1895] A. C. 154.

48. The defendant did not mention the plaintiff by name; but in view of the particular circumstances of the case, a majority of the judges reached the conclusion that he had aimed the attack at the plaintiff. They, therefore, treated the case as if the plaintiff had been mentioned by name.

truth or falsity of the statement, or to hold for the defendant irrespective of the falsity of his statement. The first possibility was rejected on the ground that if the courts were to ascertain the accuracy of such statements they would be turned "into a machinery for advertising rival productions by obtaining a judicial determination which of the two was better." As a result of this decision no remedy lies in England even though the defendant's statement is false and causes damage. It was so held five years later in *Hubbuck and Sons v. Wilkinson*.⁴⁹

The English doctrine was recently approved in this country in *National Refining Company v. Benzo Gas Motor Fuel Company*.⁵⁰ But the discussion of this point was mere dictum. Moreover, the court went no further than to say that "no recovery can be had" under the facts of the *White* and *Hubbuck* cases.⁵¹ This leaves the question whether an injunction might not issue on the ground of unfair competition. The issue is an open one today and should be decided in the light of present conditions and standards. The English doctrine is based on the premise that it is for the customers rather than for the court to determine which of two rival goods is the better. This is as sound an assumption today as it was forty years ago. The defendant's goods may be better for one purpose or for one group of people or at one time, and the plaintiff's goods for another purpose or for another group of people or at another time. To try the respective merits of several articles and weigh them against each other seems beyond the province of a court.⁵² But if judges are unwilling to determine which of two rival articles is the better, does it follow that each trader should be permitted to assert that his own article is superior to the other? Lord Herschell, in *White v. Mellin*, made the interesting statement "That this sort of puffing advertisement is in use, is notorious, . . ." and again on the same page: ". . . advertisements and announcements of that description have been common enough."⁵³ We may assume, therefore, that the court in permitting these advertisements merely recognized the then prevailing mores of the trade. In the meantime the mores have changed. Business standards are higher now than they were forty years ago.⁵⁴ Today the business community perceives and acknowledges a distinction which, though subtle, is nevertheless real; the distinction between mere puffing—that is, the

49. [1899] 1 Q. B. 86. The defendants had stated in a circular that their zinc was better than plaintiff's.

50. 20 F. (2d) 763 (C. C. A. 8th, 1927).

51. *Johnson v. Hitchcock*, 15 Johns. 185 (N. Y. 1818), cited by the court, was likewise an action for damages. See also *Tobias v. Harland*, 4 Wend. 537 (N. Y. 1830).

52. See *White v. Mellin*, [1895] A. C. 154, where the evidence tended to show that the plaintiff's food was better suited for children under six months of age while defendant's food was more desirable for children above that age.

53. [1895] A. C. 154, 165.

54. See DENNISON, *ETHICS AND MODERN BUSINESS* (1932) 1, 55.

assertion that your product is the best or better than all others—and the assertion that your product is better than that of a specifically designated competitor. While the former type of advertisement is still in vogue, the latter is generally regarded as unethical and no longer practiced by self-respecting business men.⁵⁵

In business circles the feeling seems to be growing today that one seller should not express an opinion about the goods of another, because to do so would be to act as judge in a matter where interests of his own are at stake.⁵⁶ Thus the courts' unwillingness and the competitor's unfitness to act as judge suggest that a solution be adopted which did not and could not occur to the English judges, namely, to hold comparative disparagement to be enjoined unfair competition irrespective of the accuracy of the opinion expressed. An exception may perhaps be made when a customer has requested the comparison.⁵⁷

This solution has been adopted in France and Germany. Both French and German courts have drawn a sharp distinction between mere puffing and comparative disparagement. German decisions have permitted a business man to assert that his goods are the best or better than all other goods.⁵⁸ But he must not state that they are better than those of a specified competitor. It was so held in a recent case where the defendant, a candle manufacturer, had stated in a circular that plaintiff's candles were inferior to his own in that they did not burn as brightly nor for so long a time. Said the court, in granting an injunction:⁵⁹

"Every business man is entitled to praise his own goods. But a comparison of one's goods with those of a specific competitor for the purpose of recommending the former at the expense of the allegedly inferior product is counter to the principles of honest competition and it is immaterial whether the statements made are in fact true . . . By making such a comparison a business man assumes to act as judge in his own cause. This exceeds the limits of honest competition. Even if their article is inferior, competitors cannot be made to serve as a standard of comparison for the goods or services of another. The appraisal of the goods of competing manufacturers selling at the same or different prices must be left

55. See *infra*, p. 1333-4. Cf. the Code of the American Optometric Association, reprinted in HEERMANCE, CODES OF ETHICS (1924) 399: "We agree to discontinue advertising articles or supplies as 'better' or in any way superior in quality . . . to that of other optometrists . . ."

56. See *infra*, p. 1333-4; SHARP AND FOX, *op. cit. supra* note 3, at 144-145. Cf. the Code of the National Petroleum Marketers Ass'n where the expression of opinions of a competitor's wares is specifically prohibited. HEERMANCE, *op. cit. supra* note 55, at 417.

57. Cf. *infra*, p. 1320.

58. Reichsgericht II. Z. S. Dec. 12, 1930, G.R.U.R. 1931, 165 and Dec. 2, 1932, MW 33, 121.

59. Reichsgericht II. Z. S. Nov. 25, 1932, MW 33, 71.

to the consumers. The public, when confronted with such a comparison either in an advertisement or in personal conversation is, as a rule, not in a position to verify the accuracy of the statement. Moreover, experience teaches that there exists no uniform standard for the appraisal of the qualities of an article. What appeals to some as excellent will be regarded as poor by others. Therefore, each consumer should be left to decide for himself which of two competing articles is the better. A business man who, without necessity, refers to his competitor's article and thereby influences the judgment of the consumer is guilty of unfair competition within the meaning of Section 1 of the Unfair Competition Statute."⁶⁰

The court makes the basic assumption that comparative disparagement will influence the public and, as a result, injure the competitor. This is particularly interesting since *White v. Mellin* has been defended on the opposite assumption that "statements by a trader vaunting the superiority of his goods are not likely to influence the conduct of possible customers, and hence will very seldom work damage to a rival."⁶¹ This assumption may have been justified at a time when no distinction was made between "seller's talk" (puffing) and comparative disparagement and the one was as common as the other. Today, however, since comparative disparagement is no longer generally practiced, we may assume, as the German Reichsgericht does, that the buying public has become more sensitive to its use. While consumers, as a rule, may not rely on puffing, at least some portions of them are likely to be influenced today by comparative disparagement.⁶²

The French courts, without rationalizing as thoroughly as the German Reichsgericht, have reached the same conclusion. In the case of *Violet v. X* the defendant, a producer of wine, had sold his bottles bearing the following label: "The Thir [defendant's trademark] compares favorably with Absinthe, Byrrh and Bitter." The owner of the mark Byrrh brought an action for damages on the ground of unfair competition. The court gave judgment for plaintiff, saying: "Defendant has not confined himself to praising the quality of his wine. He has also asserted that the wine Byrrh is inferior to his own and has thereby disparaged that product." This was held to be unfair competition. The accuracy of defendant's statement was not examined by the court.⁶³ In the case of *Bardou v. Sabatou*⁶⁴ the defendant, a manufacturer of cigarette paper,

60. See *supra*, p. 1309.

61. Smith, *Disparagement of Property* (1913) 13 COL. L. REV. 121, 134.

62. For a criticism of the English doctrine see "*Slander of Goods*" in *England and Germany* (1934) 78 SOL. J. 607.

63. Cour de Nancy, 1911, *Annales*, 1911, 1, 227. The decision went for plaintiff on the ground of Art. 1382 of the Civil Code. See *supra*, p. 1311.

64. Cour de Paris, *Annales*, 1869, 115.

stated on his labels that his product was far superior to that of his rival. The court granted an injunction on the ground of unfair competition, again without inquiring into the correctness of the assertion.⁶⁵

We now come to a kind of attack where the defendant not only asserts the relative inferiority of the plaintiff's product as compared to the defendant's (comparative disparagement) but judges the plaintiff by an absolute standard. The assertion here is that the plaintiff's products are "no good", "worthless", "a laughing stock", "of a low grade", "of a poor quality." It has been said that "such expressions are not uncommon among rivals in trade and their correctness in each instance is for determination of those whose custom is sought, and not of the courts."⁶⁶ But that was in 1901. In the meantime trade mores have changed, here no less than in the field of comparative disparagement, and so we need not be surprised to find that statements of this sort have been enjoined in recent years. In *Stevens Ice Cream Company v. Polar Product Company*,⁶⁷ a seller of ice cream was enjoined from stating that his rival's product was "not of high grade." The decision rested on unfair competition. In *Menard v. Houle* defendant was restrained from asserting that the plaintiff's automobiles were "no good."⁶⁸ In *Bourjois, Incorporated v. Park Drug Company*,⁶⁹ the defendant would have been enjoined from asserting that his rival's face powder was "of inferior quality"⁷⁰ if plaintiff had succeeded in proving that the statement had in fact been made.

In the three cases cited the untruthfulness of the charge seemed to be regarded as an element of the wrong. If untruthfulness is to remain a criterion, then it may be said that a sweeping condemnation of another's wares always carries with it an element of untruthfulness. In the candle

65. How far the French courts will go in condemning comparative disparagement is illustrated by a case where the defendant stated truthfully in advertisements that the Academy of Medicine had examined his and the plaintiff's pharmaceutical products and had found his to be far superior to plaintiff's. The court held this to be unfair competition. The decision rendered in 1851 [*Raquin v. Mothes* Cour de Paris, D.P. 1851, 2, 168] is one of the earliest judicial pronouncements on the French law of unfair competition and illustrates that the French never limited its meaning to passing-off but started out with a very broad concept, embracing other reprehensible practices as well.

For a collection of the French authorities see ALEXANDROFF, *CONCURRENCE DÉLOYALE* (1935) No. 606.

66. *Dallas, J., in Nonpareil Cork Mfg. Co. v. Keasbey & Mattison Co.*, 103 Fed. 721 (C. C. E. D. Pa. 1901).

67. 194 N. Y. Supp. 44 (Sup. Ct. 1921).

68. 11 N. E. (2d) 436 (Mass. 1937). The defendant was a non-competitor but the court intimated that the result would have been the same had he been a competitor. For a discussion of this case see Comment (1938) 72 U. S. L. REV. 7. Cf. *supra*, note 10: *Saxon Motor Sales Inc. v. Torino*, 2 N. Y. Supp. (2d) 885 (Sup. Ct. 1938).

69. 82 F. (2d) 468 (C. C. A. 8th, 1936).

70. The phrase was apparently used not in a comparative but in an absolute sense.

case the German Supreme Court pointed out⁷¹ that in the absence of definite standards each individual customer should be left to determine for himself which one of two competing articles is the better. The same reasoning applies here. An article may be worthless to one customer and be worth a great deal to another. It may seem of poor quality to some and of excellent quality to others. Therefore, it is both unfair toward the competitor and prejudicial to the best interests of the buying public indiscriminately to prejudice all customers against a product which may be of utility at least to some. This is the attitude the German courts have taken. In a recent case a manufacturer of certain medicinal preparations was enjoined from asserting that to use his rival's preparation was "a waste of time."⁷² In another recent case a manufacturer of socks was enjoined from implying that his competitor's product was "no good."⁷³ In both cases defendant's conduct was characterized as unfair competition. In neither case did the court examine the accuracy of the statement. The same result has been arrived at in France.⁷⁴

Nor should it matter whether the criticism is expressed in general terms or is particularized. For instance, it should make no difference whether the defendant charges that the plaintiff's linotype machines are "no good" or whether the assertion is that they are difficult to operate and wasteful of lead, that they frequently get out of order and that the type is often unclear.⁷⁵ None of these four statements is susceptible of proof. Such terms as "difficult", "wasteful", "frequently", and "often" have no definite meaning. They will mean one thing to one person and a different thing to another. All of the four statements are therefore ambiguous and likely to mislead and should be enjoined for that reason. As a general rule it should be regarded as unfair competition for a trader to express an unfavorable opinion about his rival's goods.

The situation changes somewhat if the trader has been asked by a customer to give an opinion about his rival's goods. The trader cannot be expected to decline. But he should be careful not to do his rival an injustice. There is no reason to permit a competitor, even when his opinion is asked, to indulge in a sweeping condemnation of his rival's goods. This point came up in the German case already mentioned where a seller of medicinal preparations was restrained from stating that to use his rival's product was a waste of time. An injunction was granted

71. See *supra*, p. 1318.

72. Reichsgericht II. Z. S. Nov. 3, 1936, MW 37, 133.

73. Reichsgericht II. Z. S. Feb. 23, 1937, MW 37, 292.

74. In the case of *Turbin v. Borelli* (Cour d'Aix 1870, *Annales*, 1873, 205) defendant had stated that his rival's goods were "of very inferior quality". The court awarded damages on the ground of unfair competition without examining the accuracy of the statement.

75. This illustration is borrowed from HANDLER, *op. cit. supra* note 25, at 883.

although the defendant made the utterance in response to a written inquiry. The court held he should have stated why he thought it was a waste of time. The general rule was laid down that a competitor who expresses an opinion about his rival's goods should do it in such a way as to permit others to substantiate the opinion.⁷⁶ This principle would seem to be in conformity with the present standards of many American business men.⁷⁷

What should be the rule if the statements made relate to matters of fact which are susceptible of proof?⁷⁸ Here the question will immediately be asked: Would not the interest of the public in learning as much as possible about a seller's goods justify a competitor in telling the public the truth about those goods? If we assume this proposition to be sound, great caution is called for in applying it. Suppose a manufacturer of a dentifrice truthfully states in a circular that his rival's product contains soap while his own does not. The average reader would infer that soap in a dentifrice is injurious or at least undesirable, whereas it really is not.⁷⁹ As a result, customers are misled and in gaining more information will nevertheless be acquiring a more erroneous notion of the rival's product than they had before. Or let us say that a manufacturer of a baking powder truthfully tells prospective customers that his rival's product contains no corn starch. He thereby creates the impression that corn starch is a preferable, if not necessary, ingredient in a good brand of baking powder, while in fact it is not.⁸⁰ The principle underlying

76. Reichsgericht II. Z. S. of Nov. 3, 1936, MW 37, 133 at 137. Cf. also Reichsgericht II. Z. S. Sept. 25, 1936, MW 37, 67.

77. "A Realtor should never publicly criticize a competitor; he should never express an opinion of a competitor's transaction unless requested to do so . . . and his opinion then should be rendered in accordance with strict professional courtesy and integrity." Code of the National Association of Real Estate Boards, reprinted in HEERMANCE, *op. cit. supra* note 57, at 452. "An engineer is *never* warranted in interposing between particular clients and another engineer when unsolicited. When an opinion is asked, the situation changes somewhat, but even then the burden is on the engineer called upon for an opinion to avoid any possibility of doing a brother engineer an injustice." Code of American Association of Engineers, reprinted in TAEUSCH, *POLICY AND ETHICS IN BUSINESS* (1931) 445. See also *infra*, p. 1333.

78. As to the distinction between matters of fact and matters of opinion, see Comment (1937) 16 TEX. L. REV. 90. Cf. SHARP AND FOX, *op. cit. supra* note 3, at 145.

79. LEE, *BUSINESS ETHICS* (1926) 87.

80. An additional illustration would be a case where the defendant advises prospective buyers that one customer recently returned a machine bought from the defendant's rival. Such a statement creates the impression that the machine was defective whereas the customer may have abused it or not have known how to handle it. The German Supreme Court has granted an injunction in just such a case where the defendant failed to state why the machine had been sent back. Reichsgericht II. Z. S. October 11, 1932, MW 33, 10. Cf. the Code of the Electric Power Club: "It is often difficult to distinguish between failures of apparatus by reason of defects in workmanship or design and those

these illustrations is this: When a seller tells customers that his rival's product has or has not a certain ingredient or quality and the effect of the statement would be to mislead customers as to the significance of the ingredient or quality, the practice should be prohibited as unfair competition.

But even where the presence or lack of a certain ingredient or quality is of real significance to the public in appraising a seller's product, still the net effect of a rival's statement may be misleading. In pointing out the weakness of the other's product he is more than likely to ignore its strength. Self-interest will prompt a seller to emphasize the faults rather than the virtues of his rival's goods. So we may safely assume that as a rule a seller, pretending to tell the truth, will not tell the whole truth. A cigarette manufacturer, for instance, may be accurate in telling customers that his cigarettes contain less nicotine than the products of a specified rival. Yet the same manufacturer will fail to mention that other ingredients of tobacco smoke—ammonia gas, pyridine and carbon monoxide—are more injurious than nicotine⁸¹ and that his rival's cigarettes contain less of these. Now it may be suggested that even a seller who points out only the defects of his rival's article is performing a useful public function; that once the defects have been brought to light it should be incumbent upon the rival to impress the public with compensating virtues. Those who so reason overlook the conditions under which modern competition is carried on. Were both parties to appear simultaneously in the market place and were the defendant then to reveal the defects of the plaintiff's goods, it could perhaps be argued that no harm would be done since the plaintiff could immediately supplement the defendant's statements with information of his own. Under present competitive conditions, however, rivals seldom present themselves to the public at the same time or at the same place. The defendant's attack is delivered either in personal conversation with individual customers or in circulars and letters. The one-sided picture the defendant paints of the plaintiff's article may influence the customers' minds and cause them to place their orders with the defendant before the plaintiff has had an opportunity to defend his goods. The plaintiff in many instances will lose customers before he even knows that the attack has been delivered or to whom the statements have been made. To permit this to happen would not seem to be in the best interest of the public and is manifestly unfair to the plaintiff.⁸²

due to other causes; for example, abuse or misapplication on the part of the customer. Therefore, it is not ethical to draw the attention of a purchaser to the supposed failure of a competitor's line or type of product even though occasional instances of such apparent failure may have been reported." *LEE, op. cit. supra* note 79, at 273.

81. *TAEUSCH, op. cit. supra* note 77, at 451.

82. Half truths about a rival's article are perhaps less injurious if the parties compete for the trade of expert buyers such as users of expensive machines or dealers.

It is largely for these reasons that German and French courts have taken what would seem to be the commendable position that disparagement of a rival's product constitutes actionable unfair competition even if the statements made are true. Thus the German Supreme Court enjoined a trader from stating in a circular that his baking powder contained a higher percentage of an allegedly healthful ingredient than that of his rival.⁸³ The accuracy of this assertion was held to be immaterial. Similarly, the Appellate Court of Paris recently held that a cause of action for unfair competition was shown where the defendant had added to his catalogue an apparently accurate description of the plaintiff's product.⁸⁴ And it should not matter if such description purports to be the result of scientific analysis.

The rule here advocated is subject to important qualifications. The plaintiff need not show, of course, that his name was mentioned by the defendant. It is sufficient that those whom defendant addressed were supposed to, and did, understand that the plaintiff's product was aimed at.⁸⁵ But to be actionable the attack must always be directed against an individual rival. A different situation is presented if the attack is directed against a product generally as distinguished from the product of one individual manufacturer. Suppose in an advertisement the reader is urged to put in an automatic oil-burning furnace to avoid the dirt and work that go with coal-burning types.⁸⁶ Here the advertiser did not disparage the product of an individual seller of coal-burning furnaces as being of inferior make. What he did was to disparage the type, the product as such. And the same is true if a manufacturer of coal-burning furnaces should urge his customers to remain loyal to this type because automatic furnaces explode or fail at critical moments. Here no private remedy would lie, because the attack is not individualized. A nice question may arise if the product criticized was manufactured by only one firm. The case came up in Germany when a seller of coffee published this advertising slogan: "Coffee without caffeine is like an automobile

These are more discriminating and less likely to form a hasty judgment than the general public. Yet it would seem that the difference is in degree rather than in principle.

83. Reichsgericht II. Z. S. of October 6, 1931, MW 31, 626. Accord: Reichsgericht II. Z. S. May 4, 1934, MW 34, 284. Cf. Reichsgericht II. May 9, 1936, G.R.U.R. 1937, 230, where defendant was enjoined from telling customers that plaintiff's stove consumed twice as much gas as the defendant's. Cf. also case cited *supra* note 80.

84. *Isolfeu v. Wanner* Cour d'Appel, Paris, 1934, *Annales*, 1934, 227. For a discussion see ALEXANDROFF, *CONCURRENCE DÉLOYALE* (1935) No. 616-618, where many other authorities are cited.

85. This is the rule applicable in actions for defamation and disparagement. See *National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F. (2d) 763 (C. C. A. 8th, 1927), 55 A. L. R. 423 (1928). The same rule should apply in an action for unfair competition.

86. See TAEUSCH, *op. cit. supra* note 77, at 468.

without gasoline." The Kaffee-Hag Co. was at the time the only manufacture of de-cafeinized coffee. Its suit for unfair competition was dismissed.⁸⁷ Where the attack is directed against the entire genus rather than a species, it should not matter how many sellers of the genus are in the field. The public interest in progress demands that sellers be given a full measure of freedom in discussing the relative merits or demerits of two different types of product. While it may not always be easy to draw the line between an attack on a genus and an attack on a species, the distinction seems sound in principle, and is being observed by the courts in Germany and France.⁸⁸

Exceptional cases may arise when it would not be reprehensible to refer to the product of a specific competitor by mentioning his name or brand. A trader may be unable adequately to explain to customers a mechanical improvement of his article over those in the field except by comparing his article with that of a specific competitor. But as a rule the legitimate purpose of effective advertising can be achieved by comparison with previously known *types* or *systems*, and if it can, fairness demands that an individual competitor should not be singled out for attack. On the other hand a trader should be privileged to furnish information about his rival's product if a customer so requests. He should perhaps be at liberty—although this is debatable—to defend himself against an attack on his own product by giving the public information about his rival's product, provided that such information is *calculated* and *necessary* to repel the attack. If A has pointed out to customers a certain weakness in B's machine, thereby creating the impression that A's machine is superior, an action should lie against A under the principles discussed above. But B may feel that successful litigation could not fully repair the harm done to his prestige and so he may prefer himself to correct the erroneous impression by calling the attention of customers to a weakness in A's machine, if there is one, which might counterbalance the weakness in his own. It would not seem unreasonable

87. Reichsgericht II. Z. S. March 23, 1928, MW 27-28, 347. For a discussion of the question of whether the Federal Trade Commission has power under § 5 of the Federal Trade Commission Act to issue a cease and desist order against a trader who disseminates falsehoods about a type of product, see NORWOOD, *TRADE PRACTICE AND PRICE LAW* (1938) 64.

88. For the French law see *Chambre syndicale des fabricants de papiers peints v. Etablissement Georget*, Cour de Paris, 1933, *Annales*, 1934, 5, where the defendant's statement that wall paper was unhealthful was held non-actionable on the ground that that statement did not constitute an attack on the product of a specific manufacturer. Accord: *Chambre syndicale des Bruleurs de café v. Soc. Sanka*, Cour de Paris, 1935, *Annales*, 1936, 32, where the Sanka Co. had asserted that coffee was injurious to the heart. For the German law, see Reichsgericht II. Z. S. October 5, 1934, MW 34, 461, where it was held non-actionable to assert that the ordinary wood lead pencil was wasteful. Defendant manufactured a different type of pencil. Cf. Reichsgericht II. Z. S. January 26, 1938, *Juristische Wochenschrift* 1938, 884.

for B to do this. He should not go further, however, and state, for instance, that A's machines are "no good". Such a statement is no longer defensive but itself constitutes an attack unduly disparaging A's machines. Moreover, B's right to disparage A's product in self-defense should be dependent on an attack against B's own product. No such right arises if A has inflicted upon B a wrong of a different kind. If A, for instance, has infringed B's trade-mark B should seek redress in the courts. Derogatory references to the quality of A's goods are neither calculated nor necessary to repair the damage B may have suffered as a result of passing-off.

The exceptions discussed here are recognized in Germany.⁸⁹ Perhaps experience will show that additional exceptions have to be made. The Code of the Electric Power Club has expressed the view that "It is proper to make comparison of one's own product with that of a competitor when such comparison is based on . . . data which can be readily verified by the prospective purchaser, such for example as weights and dimensions."⁹⁰ While the position taken in this Code has found some approval⁹¹ it should not be forgotten that certain data may be capable of being verified by the buying public and yet be incomplete, one-sided, and therefore misleading. And, as we saw above, this is likely to be so. The preferable rule, therefore, would seem to be that any seller who furnishes factual information about the product of a specified rival should bear the burden of proving, in an action for unfair competition brought against him, that legitimate interests of his own other than just the desire to gain a competitive advantage *compelled* him to speak about that rival's product. The wish to protect customers from injury should not be regarded as a compelling reason. If a competitor believes that his rival's products contain poisonous ingredients or otherwise threaten the lives, health, or safety of the public, he should communicate with the health authorities or such agencies as are competent and accustomed to investigate charges of this nature and to take the necessary steps for the protection of the public. Self-respecting business men regard this as the proper course to pursue. Thus, the Code of the Association of Electragists provides that it is the duty of every member to "*bring to the attention of the proper authorities the existence of electrical conditions which are unsafe to life and property,*"⁹² [Italics added] and in the Code of the International Association of Milk Dealers

89. Reichsgericht II. Z. S. Nov. 26, 1937, MW 38, 93 at 99; October 11, 1932, MW 33, 10; Nov. 3, 1936, MW 37, 133; Dec. 2, 1932, MW 33, 121. For a penetrating discussion and collection of further authorities see CALLMANN, DER UNLAUTERE WETTBEWERB (1932) 179 *et seq.*; Wassermann, in LA PROPRIÉTÉ INDUSTRIELLE (1933) 15. See also RUDLOFF-BLOCHWITZ, DAS RECHT DES WETTBEWERBS (1938) 256.

90. Reprinted in SHARP AND FOX, *op. cit. supra* note 3, at 145.

91. See note 90, *supra*.

92. HEERMANCE, *op. cit. supra* note 55, at 157.

the members are urged to report unsatisfactory conditions in a competitor's business *to the Secretary of the Association*.⁹³ It seems preferable, indeed, to let a disinterested public agency rather than a competitor be the judge of whether the products of any given trader are fit to be offered for sale.

The present trend of business policy is to sell goods on their own merits rather than on the demerits of others. To forbid traders, as a general principle, to refer to a rival's product will do much to encourage business men in this policy. Nor will the public suffer. Consumers' organizations such as have recently been created are better qualified than the competitor to furnish reliable information about the various products in the market.⁹⁴

If the courts should not accept this rule and should persist in imposing upon the plaintiff the burden of proving the falsity of the statement, then the term "falsity" should be construed in the broadest sense possible. It should be enough for the plaintiff to prove that the defendant's utterance, though literally true, was in fact misleading or failed to do complete justice to the plaintiff's product. No burden should be on the plaintiff to show that defendant had deliberately or maliciously tried to mislead customers. In an action for disparagement such a requirement may exist.⁹⁵ Where the action is for an injunction on the ground of unfair competition, the state of mind of the defendant has been held to be immaterial.⁹⁶ Whoever takes it upon himself to enlighten the public about a rival's goods acts at his own risk.

Neither should it matter whether the criticism of the goods has also reflected upon plaintiff's reputation. This troublesome issue often arises in an action for disparagement of goods because special damages must be proved, while no such requirement exists in case of defamation of character.⁹⁷ The distinction between disparagement and defamation would seem of no significance if the equitable relief of injunction is sought on the ground of unfair competition. Actions for damages which have been dismissed for want of special damage are no authority for the proposition that on similar facts an injunction should not be granted on the ground of unfair competition. Here relief should be—and apparently has been⁹⁸—given irrespective of proof of special damages. This is in line with the generally accepted ground for injunctive relief. Its func-

93. SHARP AND FOX, *op. cit. supra* note 3, at 146.

94. For the literature on the consumer movement see OPPENHEIM, *CASES ON TRADE REGULATION* (1936) 437. Cf. SHARP AND FOX, *op. cit. supra* note 3, at 260 (one of the functions of the Better Business Bureaus is to issue warnings to the public against dangerous or fake drug products).

95. Handler, *supra* note 1, at 197.

96. DERENBERG, *op. cit. supra* note 10, at 738 *et seq.*

97. Handler, *supra* note 1, at 197.

98. See cases *supra*, p. 1319.

tion is prevention of future injury rather than redress of damage inflicted in the past.

The question may be raised—and it is pertinent to all three forms of disparagement here discussed⁹⁹—whether a more lenient attitude should not be adopted when the derogatory reference to a competitor's product is made in *personal conversation* with customers rather than in written advertisements. There seems little basis for distinguishing the two situations in principle. If, in order effectively to advertise an article in newspapers or circular letters, it is unnecessary to criticize a rival's article, the same should be true of personal conversation. The ethics of salesmanship on the road should not differ from the ethics of salesmanship in print.¹⁰⁰ But there is the difficulty of proof. The only practicable way of establishing oral disparagement is to have customers testify in court. And customers, even if they remember what was said, will be reluctant to appear as witnesses. They have nothing to gain by antagonizing one of their suppliers for the benefit of the other.¹⁰¹ It is not surprising, therefore, to find that virtually all the German litigation in this field has arisen out of written disparagement.

V.

REFERENCES TO A COMPETITOR'S BUSINESS OR BUSINESS CONDUCT

A man's business has many aspects to which a competitor may be tempted to refer. To consider them all would be beyond the scope of this article. Nor is it necessary to do so. The guiding principles should not be different here from what they are when defendant disparages the plaintiff's goods. There would seem to be no reason to permit expressions of opinion. As regards statements of fact, they will, as a rule, be one-sided and misleading even though literally true. To speak about a rival's business or business policies is justifiable only if legitimate interests cannot be adequately protected by other means. Discussion of a few typical situations will serve to illustrate these principles.

A competitor sometimes criticises the price policy of his rival by stating that the rival's prices are "too high". But in determining the reasonableness of a price, cost must be considered. Cost, in turn, is determined by a variety of elements such as raw materials, wages, rent, interest on borrowed capital. A competitor cannot possibly have an intimate knowledge of all these factors. For him, without such knowledge,

99. See *supra*, p. 1315.

100. LEE, *op. cit.* *supra* note 79, at 89.

101. Wassermann, in LA PROPRIÉTÉ INDUSTRIELLE (1938) 15, on last page.

to judge and to prejudice customers against his rival's prices should be regarded as unfair competition. It has been so held in France.¹⁰²

It should also be regarded as unfair competition to compare one's lower prices with the higher prices of a specified competitor.¹⁰³ Even if no direct criticism is made, the practice will, in many instances, be equivalent to an indirect criticism of the rival's prices. French courts have taken this position.¹⁰⁴ Furthermore, price comparison is frequently misleading. It is likely to create the impression that the goods offered by the two parties are of the same quality, while in fact only the use of inferior ingredients or inferior workmanship may have allowed the defendant to quote the lower price. For this reason the German Supreme Court has held that as a general rule the comparison of prices no less than of the goods themselves constitutes actionable unfair competition.¹⁰⁵ The buyers, rather than the competitors, should make comparisons.

A more difficult question arises when we come to a seller's business conduct which is socially undesirable or is so regarded by substantial sections of the public. False advertising is probably the most conspicuous example of the first category.

When a seller ascribes to his own product qualities which it does not possess or when he makes other inaccurate statements about his product, buyers will be deceived. Does it follow that a competitor should be privileged, or even be encouraged, to call the attention of the public to his rival's misleading statements? Perhaps we should answer the question in the affirmative if there were no other way in which the public could be protected. But means have been devised to stop the practice of false advertising. The Federal Trade Commission may issue orders

102. See *Fédération Nationale des Journaux Français v. Coty*, Cour d'Appel, Paris, 1930, Gaz. Pal. 1930, 1930. Cf. the Code of the American Basket & Fruit Package Mfrs. Association, where comment on competitors' prices is stated to be unethical. HEERMANCE, *op. cit. supra* note 55, at 53; the Code of Ethics of the United Typothetae of America ("It is not safe to criticize any price until one is in possession of all the facts. The work itself does not say whether it was done by night or by day.") HEERMANCE, *op. cit. supra* note 55, at 440.

103. For unfair price advertising directed against all competitors indiscriminately see KENNER, *THE FIGHT FOR TRUTH IN ADVERTISING* (1936) 201 *et seq.*

104. *Hesse v. Grellety*, Cour d'Appel, Bordeaux, 1859, Dall. Pér. 1859, 2, 170. Defendant truthfully advertised that he was selling, at a lower price, goods of the same quality as those offered by plaintiff. The court held this to be unfair competition on the ground that the announcement implied that plaintiff charged excessive prices. Accord: *Annales*, 1913, 2, 33 and *Annales*, 1936, 367. Note the refinement of the doctrine of unfair competition at such an early date. Cf. note 65, *supra*.

105. *Reichsgericht II. Z. S. of March 11, 1927*, MW 26, 340 =R.G.Z. 116, 277; and of Nov. 26, 1937, MW 38, 98. Cf. *Reichsgericht II. Z. S. of Feb. 13, 1934*, MW 34, 202. It is unnecessary for the plaintiff to show that the defendant's products are, in fact, of a lower quality.

to cease and desist;¹⁰⁶ the state may prosecute for violation of the model false advertising statute;¹⁰⁷ business men themselves have established organizations, such as Better Business Bureaus, to deal with the problem.¹⁰⁸ If a competitor wishes to protect the public from his rival's false advertising, he should set in motion the machinery provided by these agencies. They are all impartial bodies. They do not proceed without investigation and hearing. It is unfair for a competitor to go before customers and accuse a rival of false advertising without giving him an opportunity to be heard. It is of questionable value to buyers who, when confronted with two conflicting statements, will not know which one to believe and are likely to lose confidence in the honesty and reliability of all advertisers of the product as well as in the advertised product itself.¹⁰⁹ The conclusion, therefore, seems warranted that from the point of view of the buying public it is not necessary, nor is it desirable, that competitors should be permitted to refer to the advertising matter of a rival.

But we must still consider another aspect of false advertising, namely the harm it does to competitors. When a seller makes inaccurate statements about his product he not only deceives the public but also, as a result of such deception, he is likely to capture part of the trade which might otherwise have gone to one or several of his more honest competitors. The question therefore may be asked whether competitors should not be permitted, for the sake of protecting their own interests, to advise customers of their rival's objectionable conduct. In attempting to answer this question we should not forget that false advertising, while harmful to competitors in general, does not constitute an attack on any one competitor.¹¹⁰ The seller speaks falsely about his own goods, not about those of a specific competitor. We are, therefore, not confronted with a situation where a competitor, in calling his rival's conduct to the attention of customers, could rely on self-defense as a justification. To denounce the rival would be an attack on him rather than an act of self-defense and should be regarded as actionable unfair competition.

Perhaps we should not be too much concerned about an attack made on a rival who has been guilty of deliberate misrepresentation of

106. See Handler, *supra* note 1, at 195; OPPENHEIM, CASES ON TRADE REGULATION (1936) 457 *et seq.*

107. HANDLER, CASES AND MATERIALS ON TRADE REGULATION (1937) 757.

108. *Id.* at 762 *et seq.* See KENNER, *op. cit. supra* note 103.

109. "Disparagement of competitors is injurious not only to good will among advertisers but also to public confidence in advertising." Code of Standards of Advertising Practice adopted by the International Chamber of Commerce at its congress in Berlin, June, July, 1937, Rule III(2).

110. However, a false claim by a seller that *only* his goods have certain specified characteristics is tantamount to the assertion that the competitors' products do not have the same characteristics, and, in that sense, may constitute an attack on each competitor individually.

material facts. Injunctive relief will probably be denied him on the basis of the "clean hands" doctrine.¹¹¹ But our sympathy should be with the innocent delinquent who may be unaware of the misleading implications of his advertisement and may honestly believe that what he says is the truth. Or he may be convinced that he has kept within the bounds of permissible "seller's puff". He may be willing to modify the language of his advertisement as soon as the facts are pointed out to him. Such a man should not be held up to customers as cheating the public.

It may be insisted that a competitor should at least be at liberty, without casting a reflection on his rival's character, to inform customers truthfully that the rival's advertisement contains an inaccurate statement. But the unsophisticated mind of the average purchaser will fail to perceive the distinction between a deliberate lie and an objectively inaccurate statement. A seller merely accused of the latter will stand convicted of the former.

The proper course for a competitor to pursue is to seek redress through the agencies mentioned above.¹¹² After a rival has been found guilty by one of these agencies the competitor should be at liberty to inform customers of the finding, verdict or order. This seems justified in that it tends to restore the competitive equilibrium which had been disturbed in favor of the rival.¹¹³

There remain to be discussed certain business policies which, though by no means unethical, are regarded as undesirable by substantial sections of the public. Many people, for political, social or religious reasons, may not wish to buy foreign-made products or products containing foreign raw materials; others, being in sympathy with the labor union movement, may not want to purchase from a man who employs non-union workers. Are these sentiments sufficient reason to permit a competitor, if unsolicited, to inform customers that his rival carries foreign made goods¹¹⁴ or employs non-union men? The chief objection to such a course is the danger that the competitor will not tell the whole truth and, as a result, will create a wrong impression. The rival may have

111. DERENBERG, *op. cit. supra* note 10, at 659, *et seq.*

112. Only in exceptional cases will the courts grant relief in an action against the rival. The theory still prevails that false advertising is not a tort on competitors. See Handler, *supra* note 1, at 193-194.

113. See *supra*, p. 1310.

114. A different situation is presented when a competitor truthfully points out that a *specific* product offered for sale by his rival is of foreign make or that the rival firm is under foreign control. The question as to whether a competitor should be permitted to do so has given rise to much litigation and debate in Germany. The German courts have wavered in their attitude. Their tendency seems to have been to permit the practice in times of war and high nationalistic passion and to prohibit it in ordinary times of peace. For a discussion and collection of authorities, see CALLMANN, *op. cit. supra* note 89, at 177; BAUMBACH, DAS WETTBEWERBSGESETZ (3d ed. 1936) 98.

made an honest attempt to reach an agreement with the union but may have failed through no fault of his own. He may have but a few foreign products left in stock and may have decided to abandon the foreign line entirely. Furthermore there are always a great number of buyers to whom the business policies here discussed are a matter of no concern, buyers who are primarily interested in good quality and low price. A competitor should not divert their attention from the main issue by representing his rival, if only by implication, as an anti-social or selfish individual. In making references which are intended to be uncomplimentary a competitor is likely to create a hostile atmosphere against his rival even among the disinterested and indifferent.

It would seem that a competitor is ill-qualified, nor is he needed, to furnish impartial information about another seller's business policies. Just as consumers' organizations have been established to give the public factual data on marketed products,¹¹⁵ similar agencies will be created, if sufficient interest exists, to answer buyers' inquiries about the business and business policies of sellers.

A further problem is presented when a firm is in financial difficulties. It may be reasoned that a competitor, in warning suppliers and customers, protects them from possible loss, and therefore performs a real service. On the other hand, we should not forget that the very warnings issued by a competitor may cause the collapse of a firm which would otherwise have survived. Suppliers may withhold deliveries. Banks may withdraw credit. Customers may cancel orders. Would it not be most improper for a competitor to contribute by his warnings to a contingency against which he is warning? And should it make any difference whether the information he divulges is accurate or not?¹¹⁶

Only in exceptional instances will a competitor know as a fact that his rival is unwilling or unable to perform his contracts. If in such a case a customer or a supplier is threatened with *certain* injury the competitor would seem to be privileged to speak.¹¹⁷

CONCLUSION

The foregoing discussion is not designed as an exhaustive treatment of all situations which may arise. It is merely an attempt to indicate

115. See *supra*, p. 1326.

116. In *Philip Carey Mfg. Co. v. Federal Trade Commission*, 29 F. (2d) 49 (C. C. A. 6th, 1928), it was held not to be an unfair method of competition under § 5 of the Federal Trade Commission Act to inform customers that a bankruptcy petition had been filed against a competitor. Said the court " . . . We know of no standard of practice which forbids the telling of the truth even about a competitor." It is submitted that such a standard in fact exists. See *infra*, p. 1333.

117. For an interesting illustration of such a case see *SHARP AND FOX, op. cit. supra*, note 3, at 146.

broadly the course which the writer feels should be followed if competition is to be established on a really fair basis. The conclusions arrived at may be summarized as follows:

A suit in equity for an injunction on the ground of unfair competition differs essentially from the actions at law for defamation of character and for disparagement of goods. Therefore, the conditions of liability which obtain in these two actions are not controlling in an action for unfair competition. In particular, the truth of the defendant's statement should, as a rule, not be a defense to such an action.

It should be regarded as actionable unfair competition:

(1) to inform customers or prospective customers of, or comment on

(a) a rival's past unlawful or unethical behavior whether connected with his business or not;

(b) a rival's present unlawful or unethical conduct, if such conduct is not connected with his business and casts no reasonable doubt on his reliability in performing contracts;

(c) a rival's private life, his personal views and peculiarities, or his racial origin.

(2) (a) to express to customers or prospective customers an unsolicited opinion about a rival's goods, business or business policies, or an opinion which, if solicited, fails to state a reason;

(b) to give customers or prospective customers factual information about a rival's goods, business or business policies, unless vital interests of the informant, or of the public, cannot be protected by other means.

These principles should apply irrespective of whether the information or opinion was given orally or in writing.

The rules here advocated might be challenged on the ground that they are not in accord with the constitutional guaranty of freedom of speech. But under these rules freedom of speech is not denied to a competitor. He is free to carry on scientific research and to publish its results even if they should be detrimental to a rival's product. He is at liberty to furnish information about his rival's unlawful conduct and comment upon it to public authorities and quasi-public bodies, such as Trade Associations and Chambers of Commerce. He is not prevented, if he feels inclined to do so, from entertaining his private guests with stories relating to his rival's past. However, freedom of speech never has meant the unrestricted right to say what one pleases at all times and under all circumstances. The State Constitutions themselves provide that the freedom of speech must not be abused.¹¹⁸ It would be an abuse for a competitor

118. See HALE AND BENSON, *LAW OF THE PRESS* (1933) 350, 352. Cf. *Near v. Minnesota*, 283 U. S. 697 (1931); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); CHAFEE, *FREEDOM OF SPEECH* (1920).

—with the exceptions specified above—to mention those matters in the *course of competition*, that is, for the purpose of persuading his customers not to buy from his rival or of persuading his rival's customers to buy from him.¹¹⁹

As regards the question of remedy there are still some courts which deny *equitable* relief against defamation and disparagement on the ground that the constitutional right of freedom of speech would thereby be abridged. But we have seen already that the weight of authority to-day does not hesitate to grant an injunction if the suit is brought for unfair competition.¹²⁰ Therefore, if the argument is sound that the acts here discussed constitute unfair competition, injunctive relief should not be difficult to obtain.

In discussing the concept of unfair competition a well-known student of the field has recently said that:¹²¹ "The law against the unfair trader must be constantly reappraised, and the criteria for the appraisal must be sought in business facts and understandings rather than in an abstract process of refining legal definitions." It is submitted that most of the conclusions here reached are in conformity with the present ethical standards of the business community. A study of the voluntary codes of ethics which have been adopted in many branches of industry, within the last twenty years, makes this overwhelmingly clear. A great majority of the codes examined, while differing in minor details of phraseology, forbid disparaging or derogatory references to competitors or to their goods, business or business methods. The prohibition is not aimed at false statements of fact only, but includes true statements and expressions of opinion as well. Some of the codes specifically say so. Others are so worded as to leave no room for a different interpretation.¹²²

119. Cf. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 219, 50 S. E. 68 (1905), where the court held that the constitutional right of free speech did not protect a person who published an author's picture "merely for advertising purposes, and from mercenary motives." It is interesting to note that the German Constitution of 1919 also contained a provision guaranteeing the freedom of speech. (Art. 118). Yet the German courts did not regard the conclusions here reached as incompatible with such constitutional guaranty.

120. See WALSH, *EQUITY* (1930) 264 *et seq.*; Comment (1937) 16 TEX. L. REV. 111.

121. Isaacs, Book Review (1938) 51 HARV. L. REV. 769.

122. Typical Code provisions are: "We pledge ourselves, to compete always with fairness, securing patronage on merit and without derogatory reference to a competitor or his goods." Biscuit and Cracker Manufacturing Association, *LEE, op. cit. supra* note 79, at 233; "We do not make false or disparaging statements, either written or oral, nor circulate harmful rumours respecting a competitor's product, selling price, business, financial or personal standing." American Association of Wholesale Opticians, *id.* at 267; "If you can't say good, say nothing." Retail Jeweler's Association, *HEERMANCE, op. cit. supra* note 57, at 256; "Do not knock competitors or competitors' goods". Nat. Ass'n of Farm Equipment Manufacturers, *id.* at 180. For similar provisions in numerous other Codes see *HEERMANCE*, 36, 75, 86, 96, 109, 119, 135, 145, 177, 199, 228, 242,

If these code provisions did no more than to express an abstract ethical principle, they would be of little concern to the lawyer. What lends significance to them from the lawyer's point of view is the fact that most of them have been translated into actual business practice.¹²³ This is particularly true in the field of advertising proper—*i.e.*, those media of publicity which appeal to the general public as distinguished from individual customers. Observation of bill boards, placards, posters and newspaper advertisements will show that derogatory references to a specific competitor have virtually disappeared.¹²⁴ Advertising over the radio conforms to the same standard. The members of the advertising profession being relatively few, self-regulation has proved successful.

A somewhat different situation exists where the appeal is directed not to the general public but to individual members of the public. This activity is outside the province of the advertising profession. Each seller attends to it himself and, due to the large number of sellers involved, this field is less amenable to self-regulation by the industry. So we need not be surprised to find that in letters, circulars and personal conversation, disparagement of a specific competitor still occurs. But available information indicates that even here only a minority of sellers indulge in this selling method. The majority of self-respecting business men, conforming to ethical standards, refrain from it.

To them the law owes protection. It is no answer that they can defend themselves by also resorting to disparagement. A self-respecting business man will not voluntarily adopt, and should not be driven to adopt,

244, 249, 302, 311, 322, 364, 368, 373, 374, 395, 403, 411, 425, 431, 433, 459, 465, 473, 477, 512, 516; LEE, 234, 254, 265, 270, 275, 280, 284, 287, 291, 304. *Cf.* the advertising principles of various organizations reprinted in KENNER, *op. cit. supra* note 103, at 273. Although the Trade Practice Rule usually proposed by the Federal Trade Commission at Trade Practice Conferences, unlike the voluntary Codes adopted without sponsorship by the Commission, prohibits only false disparagement, it does not follow that the Commission considers truthful disparagement or expression of criticism as fair competition. Information furnished by the Commission indicates that the purpose in drafting the rule was to have it conform to the interpretation so far given by the courts to the term unfair competition. For a collection of the industries which have adopted the Commission's Trade Practice Rule, see C. C. H. Trade Reg. Serv. ¶ 20,016 (1938).

123. LEE, *op. cit. supra* note 79, at 262. *Cf.* HEERMANCE, *THE ETHICS OF BUSINESS* (1926) 40.

124. A rather unusual advertisement appeared in the New York Times, Dec. 17, 1937, p. 5. R. H. Macy & Co. compared therein one of their own brands of laxative salt, selling at 69 cents a bottle, with another specific brand of laxative salt, price-fixed by its manufacturer and selling at 97 cents. While the name of this manufacturer was not mentioned the Macy Co. offered to sell his product to "all who want it." At the same time the public was urged to buy Macy's product which was represented to be as good as, if not better than, the other. Without implying an answer the writer wishes to raise the question whether such an advertisement accords with the highest standards of ethics. For a similar advertisement by R. H. Macy & Co. see New York Herald-Tribune, Dec. 3, 1937, p. 10.

a selling method which he regards as undignified, unfair, and repulsive. A competitor should not, by pursuing an unethical practice, force his rival to choose between its adoption and the loss of his trade.¹²⁵

Both the French and the German courts have recently approached the problem from the point of view here suggested. In France a trader had published an apparently accurate statement about his rival's product. The Court of Appeal of Paris held this to be unfair competition because the defendant's conduct was "not in accord with business custom"¹²⁶ ("contraire aux usages du commerce"). The German Reichsgericht on similar facts granted an injunction on the ground that the defendant's conduct was "out of line with the business methods of reputable merchants"¹²⁷ ("Widerspricht den Gepflogenheiten des anständigen Kaufmanns"). This reasoning applies with equal force in this country. If the law permitted a competitor to disregard ordinary business practice, it would, in effect, encourage the unscrupulous trader to gain a competitive advantage over his more conscientious rival.

In the past when a man suffered damage from his competitor, the issue has often been whether the infliction of injury was privileged by virtue of his competitive position. The minds of judges and writers have long been occupied with the question as to whether competition should not constitute a justification for acts which are unlawful if done by a non-competitor.¹²⁸ Our discussion raises the converse question: namely, whether competition in certain instances should not impose liability for acts which are lawful if done by a non-competitor. It would seem that disparagement is one of those instances. The business community strongly feels that the delicate position of competitor makes it incumbent upon a seller to remain silent where a third party may, and perhaps should, speak and criticise with immunity. Most sellers act accordingly. Can the law afford to ignore this condition?

125. See *Federal Trade Commission v. Keppel and Bro., Inc.*, 291 U. S. 304 (1934) 313.

126. See the case cited note 84, *supra*, at 228.

127. Reichsgericht II. Z. S. of January 5, 1938, MW 38, 142, 144.

128. See Handler, *supra* note 1, at 180 and, for an illustration, *Citizens Light Co. v. Montgomery Light Co.*, 171 Fed. 553, 563 (C. C. M. D. Ala. 1909).